

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

KENNETH GIBBS,  
Plaintiff,  
  
v.  
  
T. WOOD, et. al.,  
Defendants.

Case No. [15-cv-4115-TEH](#)

ORDER OF DISMISSAL WITH LEAVE  
TO AMEND

Plaintiff, an inmate at California State Prison-Los Angeles County, filed this pro se civil rights action under 42 U.S.C. § 1983. The original complaint was dismissed with leave to amend and Plaintiff has filed an amended complaint.

I

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint "is frivolous, malicious, or fails to state a claim upon which relief may be granted," or "seeks monetary relief from a defendant who is immune from such relief." Id. § 1915A(b). Pleadings filed by pro se litigants, however, must be liberally construed. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010); *Balistreri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir.

1 1990).

2 To state a claim under 42 U.S.C. § 1983, a plaintiff must  
3 allege two essential elements: (1) that a right secured by the  
4 Constitution or laws of the United States was violated, and (2)  
5 that the alleged violation was committed by a person acting under  
6 the color of state law. West v. Atkins, 487 U.S. 42, 48 (1988).

7 II

8 Plaintiff describes various incidents where he was the  
9 victim of retaliation and excessive force.

10 "Within the prison context, a viable claim of First  
11 Amendment retaliation entails five basic elements: (1) an  
12 assertion that a state actor took some adverse action against an  
13 inmate (2) because of (3) that prisoner's protected conduct, and  
14 that such action (4) chilled the inmate's exercise of his First  
15 Amendment rights, and (5) the action did not reasonably advance a  
16 legitimate correctional goal." Rhodes v. Robinson, 408 F.3d 559,  
17 567-68 (9th Cir. 2005) (footnote omitted). Accord Pratt v.  
18 Rowland, 65 F.3d 802, 806 (9th Cir. 1995) (prisoner suing prison  
19 officials under § 1983 for retaliation must allege that he was  
20 retaliated against for exercising his constitutional rights and  
21 that the retaliatory action did not advance legitimate  
22 penological goals, such as preserving institutional order and  
23 discipline).

24 "After incarceration, only the unnecessary and wanton  
25 infliction of pain . . . constitutes cruel and unusual punishment  
26 forbidden by the Eighth Amendment." Whitley v. Albers, 475 U.S.  
27 312, 319 (1986) (omission in original) (internal quotation marks  
28 omitted). Whenever prison officials stand accused of using

1 excessive force in violation of the Eighth Amendment, the  
2 deliberate indifference standard is inappropriate. Hudson v.  
3 McMillian, 503 U.S. 1, 6 (1992). Instead, the core judicial  
4 inquiry is whether force was applied in a good-faith effort to  
5 maintain or restore discipline, or maliciously and sadistically  
6 to cause harm. Id. at 6-7; Whitley, 475 U.S. at 320-21.

7 Plaintiff first argues that Captain Wood transferred  
8 Plaintiff to a different Administrative Segregation unit in  
9 retaliation for the filing of a grievance regarding the  
10 Institutional Classification Committee ("ICC"). Liberally  
11 construed this states a claim for retaliation.

12 Plaintiff next argues that he was placed on C status for the  
13 same offense, and it was in retaliation for filing grievances.  
14 However, Plaintiff does not describe C status and what it  
15 entails, and the nature of the relation allegation is difficult  
16 to understand. This claim is dismissed with leave to amend.

17 Plaintiff also argued that Defendant J. Evans used excessive  
18 force against him causing injuries to his face, nose, and wrist,  
19 and this was in retaliation because Plaintiff called another  
20 officer a racist. The excessive force claim is sufficient to  
21 proceed but the retaliation claim is dismissed with leave to  
22 amend to provide more information regarding the elements set  
23 forth above in Rhodes.

24 In filing an amended complaint, Plaintiff is informed that a  
25 "plaintiff's obligation to provide the 'grounds' of his  
26 'entitle[ment] to relief' requires more than labels and  
27 conclusions, and a formulaic recitation of the elements of a  
28 cause of action will not do. . . . Factual allegations must be

1 enough to raise a right to relief above the speculative level."  
2 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)  
3 (citations omitted). A complaint must proffer "enough facts to  
4 state a claim to relief that is plausible on its face." Id. at  
5 570. The United States Supreme Court has explained the  
6 "plausible on its face" standard of Twombly: "While legal  
7 conclusions can provide the framework of a complaint, they must  
8 be supported by factual allegations. When there are well-pleaded  
9 factual allegations, a court should assume their veracity and  
10 then determine whether they plausibly give rise to an entitlement  
11 to relief." Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

12 III

13 For the foregoing reasons, the Court hereby orders as  
14 follows:

15 1. Plaintiff's Amended Complaint is DISMISSED WITH LEAVE TO  
16 FILE A SECOND AMENDED COMPLAINT, within twenty-eight days. The  
17 pleading must state clearly how each and every Defendant is  
18 alleged to have violated Plaintiff's federally-protected rights.  
19 See Leer, 844 F.2d at 634. The pleading must include the caption  
20 and civil case number used in this order and the words COURT  
21 ORDERED SECOND AMENDED COMPLAINT on the first page. Plaintiff is  
22 advised that he must file all of his claims in one complaint and  
23 not present them piecemeal to the Court in various letters and  
24 other documents. Failure to file a proper Second Amended  
25 Complaint within twenty-eight days of this order will result in  
26 the dismissal of all claims except the claims deemed cognizable  
27 above.  
28

1           2. Plaintiff is advised that the Second Amended Complaint  
2 will supersede the original Complaint and all other pleadings.  
3 Claims and defendants not included in the First Amended Complaint  
4 will not be considered by the Court. See Lacey v. Maricopa  
5 County, 693 F.3d 896 (9th Cir. 2012) (en banc) ("For claims  
6 dismissed with prejudice and without leave to amend, we will not  
7 require that they be repled in a subsequent amended complaint to  
8 preserve them for appeal. But for any claims voluntarily  
9 dismissed, we will consider those claims to be waived if not  
10 repled.").

11           3. It is Plaintiff's responsibility to prosecute this  
12 action. Plaintiff must keep the Court informed of any change of  
13 address by filing a separate paper with the Clerk headed "Notice  
14 of Change of Address," and must comply with the Court's orders in  
15 a timely fashion. Failure to do so may result in the dismissal  
16 of this action for failure to prosecute pursuant to Federal Rule  
17 of Civil Procedure 41(b).

18           IT IS SO ORDERED.

19           Dated: 02/29/2016



THELTON E. HENDERSON  
United States District Judge

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